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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

GURSON S. DANG, Plaintiff and Appellant, v. MADELEINE MURPHY et al., Defendants and Respondents.	A122005 (San Francisco City & County Super. Ct. No. CGC-05-444666)

Appellant Gurson S. Dang owns a condominium unit in San Francisco. The documents governing the condominium project create a right of first refusal when one of the units is sold. Dang contends that this right may be exercised by any individual owner in the condominium. The other owners contend that the right may only be exercised by the board of directors of the condominium's homeowners' association.

Dang filed a complaint against the other owners in the condominium, as well as the board of directors of the homeowners' association, seeking a declaratory judgment that the right of first refusal may be exercised by any individual unit owner. The trial court agreed with the defendants' interpretation of the governing documents, and dismissed Dang's complaint. In two subsequent orders, the trial court awarded the defendants their attorney fees. Dang timely appealed from each of the trial court's rulings. Finding no reversible error in any of them, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Dang's unit is part of a four-unit condominium building (the condominium) in San Francisco.[1] The condominium is governed by a declaration of covenants, conditions and restrictions recorded in 1981 (the CCRs), as amended in 1989, and a set of bylaws. The CCRs provide for the establishment of a homeowners' association (Association) governed by a three-member board of directors (Board of Directors or Board). All unit owners are members of the Association, and all Association members are eligible to be members of the Board. Dang bought his unit in 1988. He was not a director, however, at the time of the events relevant to this litigation.

The CCRs provide for a right of first refusal. The portion of this provision most relevant to the issues presented on this appeal reads as follows: "In the event a Unit Owner shall wish to sell his or her Unit, and shall have received a bona fide offer therefor from a prospective purchaser, said Owner shall give written notice of such offer together with an executed copy of the offer to the Board of Directors of the Association. The *Board, acting on behalf of the other Unit Owners*, may purchase said Unit at the same price and on the same terms as offered by the prospective purchaser . . . ." (Original capitalization, italics added.) The provision also contains other references to the role of the Board of Directors. It states that any attempt to sell a unit "without offering the Board the right of first refusal" is null and void; it provides that "[t]he failure or refusal of the Board to exercise the right of first refusal" shall not waive that right as to a subsequent offer; and it specifies various types of intra-family transfers that are valid even if the owner of the unit transfers it "without first offering to sell the Unit to the Board." (Original capitalization.)

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[1] "[T]o the extent resolution of this matter turns on the existence of substantial evidence to support the judgment, we state [the facts] in the manner most favorable to the judgment, resolving all conflicts and drawing all inferences in favor of respondent[s]. [Citation.]" (*Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1475, fn. 1.)

In July 1989, with Dang's consent, the CCRs were amended to provide that each unit owner was entitled to a one-fourth undivided interest in the common area of the building; that each unit was to be used for residential purposes, with a specified maximum occupancy; and that the CCRs could only be amended by unanimous written consent of the members of the Association. The amendment provided that all other provisions of the CCRs were to remain in full force and effect. This was the only written, recorded amendment to the CCRs.

In August 2005, Dang learned that respondent Madeleine Murphy, the owner of another unit in the condominium, was planning to sell her unit. Dang wanted to buy it, and sent Murphy a letter on August 31, 2005, regarding the right of first refusal, but Murphy never responded. On September 7, 2005, Dang filed his initial complaint in the litigation giving rise to this appeal. On the following day, Dang recorded a notice of lis pendens.[2] Nonetheless, a grant deed memorializing Murphy's sale of her unit to Sarah Ann Haldan was recorded on September 9, 2005.[3]

The case went to trial on Dang's fourth amended complaint (the complaint), which was filed on February 13, 2007. The complaint named the following defendants: Murphy; Scott Bullerwell (Murphy's husband); Suresh Shah and Kenneth Bame (the owners of the other two units in the condominium); the Board; Haldan; and Old Republic Title Company, which recorded the deed representing the sale of Murphy's unit to Haldan.[4]

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[2] On April 28, 2008, shortly before the trial in this case, Dang filed a release withdrawing the notice of lis pendens.

[3] The deed purported to transfer the property from Murphy alone to Haldan, even though Murphy had previously added her husband, Bullerwell, to the title. At trial, Murphy explained that ultimately, a deed was recorded that reflected the transfer of Bullerwell's interest to Haldan as well.

[4] Although named as a defendant in the fourth amended complaint, Old Republic Title Company had already been dismissed as a defendant, without prejudice, on October 12, 2005. It is not a party to this appeal.

The complaint pleaded two causes of action. The first was labeled as a cause of action for declaratory relief and an injunction, and the second was labeled as a cause of action for conspiracy.[5] The complaint alleged that on July 27, 1992, the members of the condominium homeowners' association unanimously agreed that the right of first refusal provided for in the CCRs would be extended to the individual unit owners. It also alleged that Murphy and Bullerwell had not given proper notice to the Board, Dang, and the other unit owners in connection with the sale of their unit to Haldan; that the Board had not held a properly noticed meeting to decide whether to exercise the right of first refusal; and that Dang was entitled to exercise the right of first refusal and had not been given the opportunity to do so. As relief, the first cause of action sought a declaration regarding various aspects of the parties' rights with respect to the sale of Murphy's unit to Haldan, including a declaration as to whether the sale was void because of Murphy and Bullerwell's alleged failure to comply with the right of first refusal, and an injunction requiring the defendants to comply with their alleged obligations with regard to the right of first refusal.

The second cause of action alleged that Dang sent a letter to Murphy before the sale closed, reminding her of her duty to comply with the right of first refusal, and that Murphy, Bullerwell, and Bame conspired to prevent Dang from exercising that right by concealing the sale from Dang; making false statements in the disclosure to prospective buyers and in other documents related to the sale; and agreeing not to hold a Board meeting to consider exercising the right of first refusal as to Murphy's unit. It alleged that Haldan bought the unit with knowledge that the right of first refusal had not been complied with, and agreed with Murphy, Bullerwell, and Bame not to disclose the pending sale to Dang prior to the close of escrow in order to prevent him from acquiring

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[5] We say "labeled as" because, strictly speaking, declaratory relief and injunctions are forms of relief, not causes of action (see generally *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159), and conspiracy is a way of holding additional defendants liable on a tort theory, rather than a cause of action in its own right. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 45, p. 111; *id*. (2009 supp.) § 45, p. 14.)

the unit through exercise of the right of first refusal. Dang alleged that due to the conspiracy, he had been deprived of prospective economic advantage, and had been the victim of fraud and deceit. The second cause of action sought damages in the amount of $500,000, plus punitive damages. The complaint also sought recovery of Dang's attorney fees and costs.

When the case was assigned out for trial, on May 19, 2008, the defendants moved for bifurcation and a trial to the court of the equitable claims, and the trial court granted the motion.[6] When the court called the case the following day, Dang, who was representing himself, requested a continuance on the ground that his advisory counsel could not be present due to a medical emergency.[7] The court denied the request, but offered to defer Dang's opening statement so that he could consult with his counsel by phone during the recess before delivering it. As it turned out, Dang had prepared both a trial brief and a written opening statement, so Dang agreed that the trial court could review those documents in lieu of an oral opening statement. After reading the documents, the trial court denied the defendants' motion for a nonsuit without prejudice to its being renewed at the close of the plaintiff's evidence.

At trial, Murphy testified that after receiving Haldan's offer to purchase her unit, she had her agent notify the Board, but did not send letters to the other individual unit owners asking whether they wanted to match Haldan's offer. She acknowledged that she did not allow the full 15 days for the Board to exercise the right of first refusal, explaining that as a Board member herself, she knew that Haldan's offer would not be matched by the Board. She gave the same explanation for her having indicated on the disclosure form that the property was not subject to a right of first refusal. Murphy, Suresh, and Bame all testified that the Board made a decision not to exercise the right of

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[6] Prior to trial, Haldan's counsel had agreed with counsel for the other defendants that Haldan's cross-complaint against Murphy, which apparently was for indemnity, would be severed, and tried separately after the other portions of the litigation were resolved.

[7] Dang had two advisory counsel, one of whom was present at trial.

first refusal on the sale of Murphy's unit to Haldan, and that this decision was made informally. Bame testified that the decision was not reduced to writing.

Murphy also testified that when she moved into the condominium in 1998, the building needed repairs and some bills were in arrears, and no one appeared to be responsible for dealing with these issues, because it was "very hard to reach decisions operating with the kind of loose consensus that appeared to be the prevailing method."[8] As a result, the homeowners began holding elections to make sure that a designated individual would be responsible for aspects of the building, and began to meet regularly and keep minutes of their decisions. In connection with these changes, the homeowners held an election for the Board. Murphy became a member of the Board, and the secretary-treasurer of the Association. Murphy's recollection was that Dang did not want to participate in the Board.[9]

During the time that Murphy owned her unit, at least one other unit was sold. At that time, the Board members were Murphy, Bame, and Shah. Murphy testified that the offer to purchase the unit being sold was presented to the Board, but the Board was not interested, and permitted the offer to expire. Murphy was not aware that any meeting was required in order for the Board to address the offer.

Dang presented the testimony of the prior owner of Murphy's unit, Gary Tam, to the effect that just before Tam sold his unit to Murphy in 1998, Tam's real estate agent wrote a letter to each owner, which Tam distributed, offering them the right to buy Tam's unit on the same terms as those offered by Murphy.[10] Tam testified that at that time, he

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[8] Dang testified that between when he bought his unit and when Murphy bought her unit in 1998, the homeowners decided that because there were only four units, it made no sense to have a three-member board, so they called everyone a director and rotated the officer titles from year to year. He also testified that the homeowners "made a lot of changes" to the CCRs "just by mutual understanding," without any formal written amendment.

[9] Shah's testimony corroborated this.

[10] Dang testified that he wanted to buy Tam's unit when it was sold to Murphy, but was unable to do so for health reasons.

could not really say that there was a formal board of directors for the association; instead, the group considered that every owner was on the board.[11] They met together as needed, and just agreed on getting things done. At that time, each individual owner, not the Board, made their own decision regarding whether they wanted to exercise the right of first refusal. Tam testified that he did not take a lot of interest in the detail of the CCRs, was not familiar with legal terminology, and did not personally have any understanding as to how to comply with the right of first refusal provision. Thus, Tam left it to his agent to review a copy of the CCRs, interpret them, and determine how to comply with them in connection with Tam's sale of his unit.

On cross-examination during Dang's own testimony, Dang acknowledged that the 1998 letter to which Tam had referred stated that it was the Association that held the right of first refusal, and that he did not propose to the other owners, at the time, that they amend the CCRs to ensure that each individual owner would be able to exercise the right of first refusal. Dang explained that he did not think this was necessary. He pointed out on redirect that the letter also stated that each individual owner was entitled to notice of the sale, and that notice was to be given to Tam's agent "[i]f any of the *owners* . . . wish to exercise this right of first refusal" (italics added). Dang also testified that on three occasions—when Shah bought his unit[12]; when unit number three was sold due to a foreclosure in 1997; and when Bame's predecessor in his unit bought it in 2003—Dang personally was given copies of the offers received by the owners.

Regarding the sale that gave rise to this litigation, Dang testified that after he learned Murphy was in the process of selling her unit, he attempted to convene a meeting of the Board on September 5, 2005. However, Murphy had already moved out; Shah was

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[11] Dang testified to the same effect. He also testified that before 1998, one of the homeowners, Joe Ng, was the president of the Association until he sold his unit in 1997, but no one else was on the Board at that time. Shah testified that he himself was the treasurer during the time Ng was president, around 1992 or 1993, but that he did not recall who, if anyone, was president of the Association in 1998 when Murphy bought her unit.

[12] Other evidence showed that Shah bought his unit sometime prior to 1999.

out of the state; and the remaining director, Bame, persuaded Dang to postpone the meeting to September 12, 2005, because the earlier date was a holiday. In the meantime, the escrow closed on Murphy's sale to Haldan. On cross-examination, Dang acknowledged that he did not make an offer to purchase Murphy's unit when he first learned that it was on the market, because he wanted to "sit back and see what offer came in and match it," which he viewed as giving him an advantage.

On May 21, 2008, the trial court filed a statement of decision. The court interpreted the relevant provision in the CCRs to mean that "the [B]oard is the only entity that owns the 'right of first refusal' and can exercise upon it. Further, it must exercise the right on behalf of the other unit owners—as a group, and not as individuals." The court rejected Dang's contention that the provision had been modified by past practice, noting that the two offers to purchase that Dang introduced to support this contention only reflected past interpretations of the CCRs by one individual seller and one realtor, which were "not evidence of the . . . [A]ssociation's custom and practice." In addition, the court noted that the Association did not have a functioning board at the time the time the offers Dang relied upon were made, so that offering the right of first refusal to the individual owners was the only way that unit sellers could attempt to comply with the right of first refusal. Having found that Dang "does not have the right of first refusal as an individual unit owner," the court concluded that Dang had no cause of action for declaratory relief. The court also concluded that Dang's remaining cause of action for conspiracy was "not actionable as a tort," and therefore struck it, and dismissed the case as against all defendants.

On May 27, 2008, the court entered judgment in favor of the Board, Murphy, Shah, and Bame. On June 5, 2008, Dang filed a timely notice of appeal from that judgment. On May 18, 2009, the court entered judgment in favor of Haldan.[13]

[13] Neither judgment expressly referred to Bullerwell. On July 10, 2009, however, this court ordered that the two judgments be consolidated, and that all named defendants be incorporated into the judgment. Accordingly, the judgment on the merits in favor of defendants has, in effect, been amended to include Bullerwell.

On June 10, 2008, the Board filed a motion for attorneys fees concurrently with its memorandum of costs, seeking fees in the amount of $84,793.50. The trial court granted the motion orally on the record on July 7, 2008, but awarded only $25,000 in fees. The ruling was memorialized in a written order filed on July 24, 2008. On July 9, 2008, Bullerwell also filed a motion for attorney fees in the amount of $20,862, and a memorandum of costs.[14] The trial court granted this motion in part as well, striking the cost bill as untimely, but ordering Dang to pay Bullerwell attorney fees in the amount of $7,500. This ruling was memorialized in a written order filed October 1, 2008.

On October 17, 2008, this court granted Dang leave to amend his notice of appeal to include the two attorney fee orders entered after judgment. Dang's amended notice of appeal was timely filed on October 22, 2008. As a result of the amendment of the notice of appeal, and with this court's permission, Dang filed three versions of his opening brief. The last version, filed on July 30, 2009, superseded the two earlier versions, and is the opening brief relied upon by this court in deciding Dang's appeal.

DISCUSSION

A. Trial Court's "Legal Advice" to Defendants

After Dang rested his case at trial, the trial judge asked what defense counsel wished to do. Counsel indicated that they wished to bring a motion for nonsuit. The trial judge responded, "Well, at a bench trial you don't bring a motion for nonsuit. You bring a motion pursuant to [Code of Civil Procedure section] 631.8. Is that what you mean?" Defense counsel answered in the affirmative, and the trial court proceeded to hear argument on the motion. Dang now argues that in suggesting the proper statutory basis for the motion, the trial court improperly gave legal advice to defense counsel, and that the motion should have been denied because it was brought on the wrong statutory basis.

To the extent that this argument implies that the trial judge exhibited bias in favor of the defense, we reject the implication. At several points in the trial, the trial judge

[14] Bullerwell is an attorney who represented himself during portions of the litigation. He sought attorney fees only for the portion of the litigation during which he was represented by counsel.

assisted Dang concerning how to proceed—for example, by suggesting that he rephrase a question to overcome an objection by defense counsel—or in other ways, such as by explaining the concept of an offer of proof. The judge also permitted Dang to call Murphy as a witness even though she was not listed on his witness list. Thus, an overall review of the record makes it plain that the trial judge's correction of the statutory basis for defense counsel's motion did not reflect bias or favoritism of any kind.

In any event, Dang provides no argument or authority supporting his contention that the motion should have been denied, and that the judgment should be reversed, merely because defense counsel initially did not base the motion on the correct statute. In fact, the law is to the contrary. In *Commonwealth Memorial, Inc. v. Telophase Society of America* (1976) 63 Cal.App.3d 867, 869, fn. 1, 872, the trial court, sitting without a jury, granted the defendant's purported motion for nonsuit at the close of the plaintiff's evidence. The Court of Appeal treated the case as if the defendant had moved for judgment pursuant to Code of Civil Procedure section 631.8, and affirmed. Thus, even if the trial judge in this case had allowed counsel's error to stand, the judgment would not be subject to reversal on that ground. A fortiori, since counsel adopted the court's suggestion and corrected the grounds for the motion, counsel's initial error is not a basis for reversal.

Moreover, our state Constitution provides that "No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) In keeping with this constitutional mandate, appellate courts will not reverse on the basis of a procedural error, unless the appellant affirmatively demonstrates that the error was prejudicial. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.) It is simply not sufficient for an "appellant to point to the error and rest there." (*Santina v. General Petroleum Corp.* (1940) 41 Cal.App.2d 74, 77.) Here, Dang points to no prejudice resulting to him from defense counsel's initial mischaracterization of the motion, or from the trial court's correction. Accordingly, even if it was inappropriate for the trial judge to

point out to defense counsel the proper statutory basis for their motion, that is not a basis for reversal of the judgment.

B. Sufficiency of Evidence as to Ownership of Right of First Refusal

Dang contends there was sufficient evidence that custom and practice established that the individual owners had the right of first refusal.[15] This argument turns the applicable standard of review, which is the substantial evidence test, on its head.

The substantial evidence test was summarized as follows by our Supreme Court in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559: " 'In reviewing the evidence on . . . appeal *all conflicts must be resolved in favor of the [prevailing party]*, and all legitimate and reasonable inferences indulged in to uphold the [finding] if possible. It is an elementary, but often overlooked principle of law, that when a [finding] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will *support* the [finding]." (*Id.* at p. 571, italics added, quoting *Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429.) To put it another way, "[w]hen a judgment is attacked for insufficiency of the evidence, the appellate court must review the whole record in the light *most favorable to the judgment below* to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that some reasonable trier of fact could find that the judgment and each essential element thereof was established by the appropriate burden of proof." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 414, italics added.)

Thus, in reviewing the trial court's judgment under the substantial evidence test, we view the evidence *most favorably to the prevailing party*, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th

[15] Dang does not contend that the trial court erred in interpreting the CCRs themselves as providing that the Board was the sole holder of the right of first refusal.

1094, 1100.) In short, "[a] judgment will not be reversed based on an evaluation of the *strength* of the opposing evidence or the relative weakness of supporting evidence when compared to opposing evidence. It can be reversed based only on the *absence or insubstantiality* of supporting evidence, as determined from a review of all related evidence in the record. [Citation.]" (*Rivard v. Board of Pension Commissioners*, *supra*, 164 Cal.App.3d at p. 413, original italics, fn. omitted.)

Accordingly, the issue on appeal is not whether there would have been sufficient evidence to authorize the trial court to find in Dang's favor. The issue is whether the findings actually made by the trial court were supported by substantial evidence. If so, the fact that there was also sufficient evidence to justify a contrary finding is not grounds for reversal on appeal.

In this case, the trial court's finding that the right of first refusal had not been modified by custom and practice is supported by substantial evidence. The amendment to the CCRs that Dang signed in 1989 provided that the CCRs could only be modified in a formal, signed, recorded writing. There was uncontroverted evidence that no written modification to the right of first refusal provision had been recorded. This evidence alone is sufficient to support the trial court's finding that the CCRs had not been modified as Dang contended.

Moreover, Dang produced no evidence that any individual owner had ever actually been permitted by the Board or the other owners to *exercise* the right of first refusal when a unit was sold. Dang did produce evidence that the right of first refusal had been *offered* to individual owners on a few occasions. However, these offers were not made by the Board, or by the members of the Association themselves (either collectively or individually), but rather by individuals who did not have the authority to modify the right of first refusal provision. In addition, there was evidence that these offers were made only at times when there was no formal Board in operation that could have exercised the right of first refusal. Thus, this evidence does not establish that no rational trier of fact could have found in favor of respondents on this issue. Accordingly, the standard of

review requires that we uphold the trial court's finding that the CCRs had not been modified to provide for exercise of the right of first refusal by individual unit owners.

C. Failure to Rule on All Requests for Declaratory Relief

The trial court's statement of decision and judgment ruled on only one of the issues as to which the complaint sought declaratory relief. Dang argues on appeal that the trial court erred in failing to issue declarations on the remaining issues raised in his complaint. Our standard of review on this issue is whether the trial court abused its discretion in declining to rule on the remaining issues. (*Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 48.)

In the present case, we find no such abuse of discretion. The trial court determined at the outset of the trial that the sole issue to be tried in the initial phase of the case was whether the right of first refusal in the CCRs belonged solely to the Board, or could also be exercised by an individual owner. Once the trial court decided that issue adversely to Dang, the other issues as to which he sought declaratory relief were essentially moot.

The issues that Dang contends the trial court should have adjudicated all relate either to whether the Board followed proper procedures in reaching its decision not to exercise the right of first refusal when Murphy sold her unit, or to alleged procedural irregularities in the way in which Murphy proceeded in notifying the Board of Haldan's offer, and in closing the transaction. It was clear from the evidence at trial that the members of the Board all concurred in the decision to allow Murphy's sale to Haldan to go forward. Thus, a ruling that the Board or Murphy did not follow the proper formal procedures in that connection, or that the transaction did not close properly, would not have had any practical effect on Dang's rights with respect to the sale of Murphy's unit. Issuing declaratory relief on these issues would not have been appropriate. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [fundamental basis of declaratory relief is existence of actual, present controversy over proper subject]; *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 618; *Babb v. Superior Court* (1971) 3 Cal.3d 841, 848; *Travers v. Louden* (1967) 254 Cal.App.2d 926, 929 [declaratory relief is

not proper procedure when rights of complaining party have crystallized into cause of action for past wrongs].) Accordingly, we are not persuaded that the trial court abused its discretion in declining to adjudicate Dang's requests for additional declaratory relief.

D. Determination that Attorney Fees Were Available By Statute

As a condominium project, the property in which Dang and his neighbors lived was subject to the provisions of Civil Code sections 1350-1378.[16] Dang does not contend otherwise. Under that statutory scheme, when any party brings "an action to enforce the governing documents" of the project, "the prevailing party shall be awarded reasonable attorney's fees and costs." (§ 1354, subd. (c).) The trial court awarded attorney fees to the Board and Bullerwell based on this statute.

Dang argues on appeal that this was improper, because his action was not brought to enforce the CCRs. As Dang acknowledges in his reply brief, however, the purpose of his bringing the action was "to obtain a judicial determination regarding the individual owner's rights under [the] Right of First Refusal" contained in the CCRs, as well as a determination of the rights extended by the CCRs to himself and others as homeowner members of the Association. Moreover, the fundamental basis of Dang's action was his contention that he had been deprived of his asserted right *under the CCRs* to an opportunity to purchase Murphy's unit on the same terms as those offered by Haldan. Thus, the action was plainly one "to enforce the governing documents." It is therefore equally plain that the prevailing party in the action had the right to recover attorney fees under section 1354, subdivision (c).

Dang also contends that attorney fees should not have been awarded to the Board, Murphy, Shah, and Bame, because their attorney, Peter Van Zandt, acted in bad faith by telling Dang that his clients would not seek an attorney fee award if they prevailed. However, examination of the letters cited by Dang in support of this contention reveals that Van Zandt never made any such representation. On the contrary, in the first letter, dated February 13, 2007, Van Zandt warned Dang that he expected Dang to lose the case

[16] All further statutory references are to the Civil Code unless otherwise noted.

on the merits, and that if so, Dang would owe Van Zandt's clients and their insurer "a great deal of money." In the second letter, dated February 20, 2007, Van Zandt denied that the first letter stated that Dang would be responsible for attorney fees if he lost the case, but cited section 1717 and Dang's own prayer for attorney fees in his fourth amended complaint (which Van Zandt characterized as improper) as a potential basis on which Zandt *could* seek a fee award if his clients prevailed. At no time did Van Zandt specifically represent to Dang that his clients would *not* seek an attorney fee award, either under section 1354, subdivision (c), or otherwise.

Even if he had, Dang cites no authority for the proposition that acts of bad faith on the part of the prevailing party's counsel during the course of the litigation constitute a basis for denying a motion for an attorney fee award under section 1354, subdivision (c). On the contrary, the plain language of this statute provides for a mandatory attorney fee award to a prevailing defendant, without imposing further conditions on the right to such an award. (See, e.g., *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1039.) Elsewhere in his brief, Dang cites cases holding that prevailing defendants were entitled to fee awards only if the plaintiff's action was frivolous or brought in bad faith. Those cases were decided under different statutes, however, and are therefore not on point. (See *People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810 [discretionary fee award under Gov. Code, §§ 91003, subd. (a), 91012]; *County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 869-870 [fee award under federal civil rights statute]; cf. *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 473-476 [award of fees to prevailing plaintiff in civil rights action not barred by defendant's asserted good faith].)

E. Defects in Service of Notices of Motion for Attorney Fees

Dang contends that both the Board's motion for attorney fees and Bullerwell's were improperly noticed or served, and that the motions should therefore have been denied. Dang provides no authority for the proposition that procedural defects in the service of a motion require that the motion be denied on the merits, or that an order granting an improperly served or noticed motion must be reversed on appeal. Nor does

Dang argue that he was unaware that the motions had been filed, or that he was otherwise prejudiced by the asserted procedural improprieties.

In order to prevail on appeal, an "appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority. [Citations.]" (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) If the appellant does not "present a factual analysis and legal authority on each point made[,] . . . the argument may be deemed waived. [Citations.]" (*People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200.) In addition, as already noted, appellate courts will not reverse on the basis of a procedural error, unless the appellant affirmatively demonstrates that the error was prejudicial. (*Paterno v. State of California, supra,* 74 Cal.App.4th at pp. 105-106.) For all of these reasons, none of Dang's contentions regarding asserted defects in the service of the attorney fee motions presents grounds for reversal.

F. Determination that Respondents Were Prevailing Parties

Dang also attacks the trial court's award of attorney fees to the Board and Bullerwell on the ground that they were not the prevailing parties. In support of this argument, Dang asserts that (1) he did receive a judicial declaration as to the ownership of the right of first refusal, which was part of the relief he sought, and (2) that he was the prevailing party under the "catalyst" theory, because when Bame sold his unit in June 2006, during the pendency of the litigation in the trial court, Bame offered Dang individually a right of first refusal.

Dang's first contention is based on an erroneous premise. The trial court's statement of decision does discuss the court's conclusion that the right of first refusal can be exercised only by the Board and not by individual unit owners. The *judgment*, however, does not grant Dang any relief of any kind. Rather, it recites that the trial court has granted the defendants' motion under Code of Civil Procedure section 631.8, and has ordered that Dang's case be dismissed. It therefore orders the entry of judgment in favor of the defendants. As is clear from this review of the judgment, Dang did not in fact obtain even partial declaratory relief. Dang offers no authority for his argument that a

plaintiff can be considered a prevailing party when the trial court has entered an unconditional judgment in favor of the defendants, and has dismissed the plaintiff's action in its entirety on the merits.

In support of his "catalyst theory" argument, Dang cites *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604. In that case, our Supreme Court stated: "In order to obtain attorney fees without . . . a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, as elaborated in *Graham* [*v. DaimlerChrysler Corporation* (2004) 34 Cal.4th 553]; and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Id.* at p. 608.) Dang has established none of these elements. In particular, he has failed to establish that his lawsuit "had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense." (*Ibid.*) Accordingly, Dang cannot be characterized as the prevailing party in this case on the catalyst theory.

G. Grant of Belated Attorney Fee Motion by Bullerwell

With respect to Bullerwell in particular, Dang argues that Bullerwell's motion for attorney fees should not have been granted because he waited too long before filing it.[17] Dang contends that Bullerwell should have filed his motion at the same time that the other defendants filed theirs, but cites no authority for that proposition.

Dang also asserts that Bullerwell waived his right to fees, or was collaterally estopped from seeking fees, due to his failure to join in the other defendants' fee motion. Dang cites authorities defining waiver and estoppel, but provides no argument or explanation as to how those concepts apply to the facts of the present case. Dang cites no evidence that Bullerwell *intentionally* waived his right to fees. (See *City of Ukiah v.*

[17] Bullerwell did not file a respondent's brief in this court. Accordingly, we decide this issue, which is the only one relating solely to Bullerwell, on the basis of the record and Dang's opening brief. (Cal. Rules of Court, rule 8.220(a)(2).)

Fones (1966) 64 Cal.2d 104 [waiver is the intentional relinquishment of a known right].) Dang argues that estoppel from silence may arise where there is a duty to speak, but cites no authority for the proposition that Bullerwell had such a duty with respect to his attorney fee motion.

When an appellant's "discussion on [a] point is conclusory and fails to cite any authority to support the claim[,] [s]uch a presentation amounts to an abandonment of the issue. [Citations.]" (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284; see *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.) Moreover, Dang has not demonstrated that he was prejudiced by Bullerwell's delay in bringing the motion, which, as we have already explained, is necessary in order to obtain a reversal on appeal based on a procedural error. (See *Paterno v. State of California, supra*, 74 Cal.App.4th at pp. 105-106.) For all of the foregoing reasons, we decline to reverse the attorney fee award to Bullerwell.

H. Additional Grounds Asserted for Reversal

In one section of his brief, Dang sets forth a list of additional asserted substantive or procedural errors on the part of the trial court, but makes no effort to provide a cogent legal analysis in support of his contentions, or to cite and apply the applicable law to the facts of the instant case. He also fails to explain specifically how the purported errors prejudiced his case.

Due to Dang's failure to present argument and demonstrate prejudicial error as to these issues, we find no basis for reversal, and therefore need not reach the question whether the asserted errors were, in fact, errors. (See *Bullock v. Philip Morris USA, Inc.*, *supra*, 159 Cal.App.4th at p. 685 ["appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority"]; *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200 ["appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived"]; see also *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.*, *supra*, 86 Cal.App.4th at p. 284.)

DISPOSITION

The trial court's judgment and its orders awarding attorney fees are affirmed. Respondents shall recover their costs on appeal, but inasmuch as respondents have not requested an award of attorney fees on appeal, the award of costs on appeal does not include attorney fees.

_____
RUVOLO, P. J.

We concur:

_____
REARDON, J.

_____
RIVERA, J.